No. 11691

In the United States Circuit Court of Appeals for the Ninth Circuit

JOHN O'SULLIVAN, APPELLANT

v.

HE E. WOODS, Acting, Housing Expediter, ... Office of Housing Expediter.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF OF APPELLEE

ED DUPREE,
General Counsel,
HUGO V. PRUCHA,
Assistant General Counsel,
Litigation Branch.
NATHAN SIEGEL,
Special Litigation Attorney,
Office of the Housing Expediter, Office of the General Counsel, Temporary "E" Building, Washington 25, D. C.

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STATEMENT OF THE CASE

This is an appeal by the defendant below from a judgment for statutory damages pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C., Sec. 901 et seq.), for alleged violation of the Rent Regulation for Housing, as amended (8 F. R. 14663) (R. 21, 26).

The material facts upon this appeal are not in dispute. Defendant is the owner of housing accommodations located in San Francisco, California. As such, defendant since July 1, 1942, has been subject to the Rent Regulation for Housing (hereinafter referred to as "the Regulation"). This Regulation went into effect July 1, 1942, and established March 1, 1942, as the maximum rent date.

Under Section 4 (e) of the Regulation, it is provided that the maximum rents for housing accommodations, not rented at any time during the two months ending on the maximum rent date (or between that date and the effective date), shall be, so far as is here pertinent, the first rents for such accommodations after the effective date. But, in cases where the accommodations are so rented for the first time after the maximum rent date, the landlord is obliged to register the accommodations with the Area Rent Office within thirty days after so renting. The purpose of requiring a timely registration statement is to provide the Area Rent Director with prompt information of the new renting, so that he may speedily proceed to review the first rent to determine whether it ought to be reduced under the applicable standards. Where the registration statement is filed in time, any order of the Area Rent Director reducing the maximum rent operates prospectively only.

However, the Administrator felt that if the landlord failed to file a proper registration statement within the specified time, that he ought not to gain by his own delay. Therefore, Section 4 (e) of the Regulation likewise provides that in such a case, the self-determined rent fixed and received by the landlord is "subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under Section 5 (c) (1)." Section 4 (e) further provides that unless the Rent Director finds that the landlord was not at fault in failing to file a timely registration statement and, therefore,

relieves the landlord of the duty to refund, that the landlord is obliged to refund the excess payments to the tenant within thirty days after the date of the issuance of the reduction order (Section 4 (e) of the Regulation, App. 28).

Section 5 (c) of the Regulation provides that the Administrator at any time on his own initiative or on application of the tenant "may order a decrease of the maximum rent otherwise allowable" on the ground, among others, that "(1) the maximum rent for housing accommodations under * * * Section 4 is higher than the rent generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date" (Section 5 (c), App. 29).

Section 204 (d) of the Act requires every enforcement court to accept as valid and binding in a proceeding before it, any regulation or order issued pursuant to Section 2, and commits all questions relating to the validity thereof solely to the Emergency Court of Appeals (App. 24–25).

The testimony showed that the defendant rented the accommodations involved in this case to Ruth Kalen and her daughter on February 20, 1944, and the Court found that the date of the first rental of these housing accommodations subsequent to March 1, 1942 (maximum rent date) was February 20, 1944 (Finding III, R. 18). The Court further found that from February 20, 1944 to March 1945, defendant demanded and received from the above-named tenants, the sum of $75.00 per month for the housing accommodations

(Finding IV, R. 18). These accommodations were not registered within thirty days of such renting as was required by Section 4 (e) and Section 7 of the Regulation (See App. 29), but, as the Court found, defendant first registered these accommodations on March 10, 1945 (Finding V, R. 18).

On October 31, 1945, the Area Rent Director, acting pursuant to authority vested in him by Section 5 (c) (1), issued an order[1] reducing the rent for the accommodations from $75.00 per month to $62.50 per

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[1] This order provides as follows (R. 44–45):

"To: John O'Sullivan, 1235 Filbert St., San Francisco, Calif.

"Due notice having been given the landlord of the above-described accommodations, the Rent Director has considered the evidence in this matter and finds that the facts in this case require a reduction of the Maximum Rent on the grounds stated in Sections 5 (c) (1) and 4 (e) of the Rent Regulation.

"Therefore, on the basis of the rent which the Rent Director finds was generally prevailing in this Defense-Rental Area for comparable housing accommodations on the Maximum Rent Date, it is ordered that the Maximum Rent for the above-described accommodations be, and it hereby is, changed from $75.00 per month to $62.50 per month, retroactive beginning with the first rental period after September 30, 1943.

"Issued October 31, 1945. No rent in excess of the Maximum Rent established by this order may be received or demanded. This order will remain in effect until changed by the Office of Price Administration.

"The Rent Director finds that the landlord has failed to file a registration statement for the above housing accommodations within 30 days as required by Sections 4 (e) and 7 of the Regulation. This order shall, therefore, be effective to decrease the maximum rent from the beginning of the first rental period on or after October 1, 1943. Any rent received by the landlord in excess of the maximum rent fixed by this order for a rental period commencing on or after said date shall be refunded to the tenant, within 30 days from the date of this order" (R. 44–45).

month, making such reduction effective from the first rental period, and directing the defendant to refund to the tenants, within thirty days after the issuance of the order, any rent received by the defendant in excess of the maximum legal rent fixed by the order (R. 44–45). The Court found that a copy of said order was mailed to the defendant (R. 19).

Upon defendant's refusal to comply with the order directing the refund of overcharges, this action was instituted by the Administrator for statutory damages under Section 205 (e) of the Act, and for injunctive relief pursuant to Section 205 (a) of the Act (R. 2–5).

In his answer, defendant denied the charges of violation and, as a further separate and affirmative defense, alleged that the action was barred by the statute of limitations provided by Section 205 (e) of the Act (R. 5–7).

After trial, and upon consideration of the pleadings, the Court found that the amount of rent demanded and received by the defendant from the tenants from February 20, 1944, to March 1945, in excess of the maximum legal rent fixed by the order was $150.00, and that defendant had failed and refused to refund to the tenants said sum within thirty days of the issuance of the order or on November 30, 1945, as was required by the order reducing the rent (Finding VII, R. 19); and the Court concluded that upon defendant's failure to refund the sum of $150.00 to the tenants by November 30, 1945, the said sum of $150.00 became an overcharge on December 1, 1945, within the pro-

visions of Section 205 (e) of the Act (Conclusion of Law II, R. 20). In sum, the Court held that the statute of limitations provided by Section 205 (e) ran from the time when the defendant failed or refused to obey the retroactive rent-reduction order of the Area Rent Director, rather than from the time when the rent was collected, as contended by defendant. Injunctive relief was denied without costs and without prejudice (R. 22). From this judgment defendant takes this appeal. Presumably, jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. 225).

ARGUMENT

I

The court below was clearly correct in holding that the action was not barred by the statute of limitations provided for by section 205 (e) of the act

A. The statute of limitations started running at the occurrence of the violation; and the violation occurred when defendant refused to obey the refund order of the Area Rent Director

The plain words of Section 205 (e) of the Act support the conclusion reached by the Court below that the statute of limitations ran, not from the time that the rent was paid, but rather from the time the landlord refused to obey the order to refund.

Section 205 (e) provides in part:

> If any person selling a commodity violates a regulation, order * * * prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the

> occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge * * *. For the purposes of this section, the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order * * * prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator the buyer shall thereafter be barred from bringing an action for the same violation or violations * * *.

Thus, Section 205 (e) clearly gives a cause of action to a tenant or to the Administrator for a *violation* of a regulation or order prescribing a maximum rent *resulting in an overcharge.* If defendant had refunded the excess payments to the tenant as the order directed at any time prior to December 1, 1945, there would have been no violation and no foundation for suit. Hence, since no cause of action accrued until December 1, 1945, it was not possible for the statute of limitations to begin running at any earlier date.

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While defendant's failure to file a timely registration statement for the premises in question violated Section 7 of the Regulation, such violation did not result in an overcharge to the tenant (*Creedon* v. *Babcock,* 163 F. 2d 480 (C. C. A. 4th). At that point, pursuant to Section 4 (e) of the Regulation, the legal maximum rent was still the first rent charged, subject to modification by the Area Rent Director upon consideration of the rent generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date, if and when the matter was brought to his attention. Not until the Rent Director issued his order of October 31, 1945, reducing the rent retroactively, did there exist an order prescribing a maximum rent for the premises involved which defendant violated with a resulting overcharge. The precise time of violation was December 1, 1945, the day after the last day allowed defendant for refund of the rent overcharges. Until November 30, 1945, defendant could refund the rent overcharges and still be free from any liability. Defendant's failure to refund by the end of November 30, 1945, was the only violation of an order establishing a maximum rent for which Section 205 (e) of the Act gives a cause of action. At that point, both violation and overcharge occurred. Until December 1, 1945, neither the tenant nor the Price Administrator had any cause of action against the defendant based upon such overcharges. Prior to the Rent Director's order establishing retroactively a reduced maximum rent, neither the tenant nor the Administrator could

bring an action for overcharges because such overcharges had not occurred.

Upon defendant's construction of the Act, however, the one-year period of limitation prescribed by Section 205 (e) would commence to run *before* the cause of action given to the tenant, and alternatively to the Price Administrator, came into existence. Such an interpretation of Section 205 (e) is clearly erroneous in that it disregards the established rule that a statute of limitations commences to run only when a cause of action has accrued so that suit may be instituted upon it. In analogous situations, the Supreme Court has held that statutes of limitation commence to run on a receiver's cause of action to collect an assessment from the stockholders of an insolvent national bank not from the day when the assessment is made, but rather from the last day allowed by the Comptroller of the Currency for payment of the assessment as determined by him. *Rawlings* v. *Ray,* 312 U. S. 96; *Fisher* v. *Whiton,* 317 U. S. 217; *Cope* v. *Anderson,* 67 S. Ct. 1340 (June 1947). So, too, the clear purpose of Section 205 (e) of the Act here is fulfilled only by construing it literally and logically to mean that, under circumstances such as these, the cause of action for damages accrues and the statute of limitations commences to run on the date when the landlord is first in violation of a rent order, which establishes the existence of overcharges.

This construction is also consistent with the plain words of the Act. Congress did not use the word "violation" loosely or by mistake, intending instead

to say "overcharge." The limitation sentence referred to above declares in part:

> If any person selling a commodity violates a * * * order * * * prescribing a maximum price * * * the person who buys such commodity * * * may, within one year from the date of the occurrence of the *violation* * * * bring an action against the seller on account of the *overcharge* * * *. [Italics added.]

Reference to this limitation provision shows that Congress used the two italicized words in the same sentence for different purposes, keeping distinctly in mind their difference in meaning. The same distinction is carried out in several other portions of the section. In each instance, "violation" was used as indicating the point from which the statute begins to run, and "overcharge" as indicating the basis for, and partial measure of, damages in the action.

To adopt the defendant's reasoning, however, would require us to say that Congress intended the word "violation" to mean "overcharge" despite the careful differentiation between them. We may not assume that in using two different words in the same section, Congress intended to convey the same meaning for both words.

The decision below gives effect to the intent of Congress as evidenced by the plain language used. The same conclusion was reached by the Fourth Circuit Court of Appeals in *Creedon* v. *Babcock,* 163 F. 2d 480. There, too, the question was squarely raised whether the statute of limitations ran from the time

when rent was collected, or from the time when a landlord had refused to comply with a retroactive rent reduction order. Reversing the judgment below, which in effect held that the statute of limitations ran from the time of collection of rent, the Court said as follows (p. 483):

> It should be noted at the outset that the validity of the order of December 30, 1944, is not before us since that question could not be raised in the court below. *Bowles* v. *Meyers,* 149 F. 2d 440; *Porter* v. *Eastern Sugar Associates,* 159 F. 2d 299. Failure to register gave no right to sue and therefore does not govern the limitation period. Compare *Rawlings* v. *Ray,* 312 U. S. 96. Until the last day on which refund could be made in compliance with the O. P. A. order, that is, 30 days after the order was issued, or January 30, 1945, there could be no violation. This must be so since a refund payment prior to that date would have been in full compliance with the order and hence would have given no foundation for suit. It follows necessarily from the plain and imperative words of the Act—"within one year from the date of the occurrence of the violation"—that the limitation period started the day following January 30, 1945, which was the date of the occurrence of the violation * * *. It becomes apparent upon a close reading of the Act, that the word *violation* is used in a sense that is quite separate and distinct from the word *overcharge.* Particularly significant is the first sentence of Section 205 (e) quoted above: "If any person selling a commodity violates a * * *

> order * * * prescribing a maximum price * * * the person who buys such commodity * * * may, within one year from the date of the occurrence of the *violation* * * * bring an action against the seller on account of the *overcharge* * * *." Violation is used to indicate the point from which the statute begins to run, whereas overcharge indicates the basis of, and the yardstick for, damages * * *. We think the language of the Act makes a clear distinction between *violation* and *overcharge.* We conclude, therefore, that none of the claim here involved is barred by the statute of limitations. This conclusion fully accords with the generally established rule that a limitation period begins to run only *after* the accrual of the right to prosecute a claim or cause of action. 34 Am. Jur. (Limitation of Action), Sec. 113. There was no such right here until the "occurrence of the violation," and that, as we have pointed out, did not come into being until Babcock refused to comply with the order of December 30, 1944.

The great weight of authority is in accord with this decision of the Fourth Circuit Court of Appeals (*Bowles* v. *Gotterdam,* 72 F. Supp. 1022 (S. D. Ohio); *Porter* v. *Butts,* 68 F. Supp. 516 (S. D. Ohio); *Haber* v. *Garthly,* 67 F. Supp. 774 (E. D. Pa.); *Porter* v. *Sandberg,* 69 F. Supp. 29 (W. D. Ark.); *Parham* v. *Clark,* 68 F. Supp. 17 (E. D. Mich.); *Fleming* v. *Schleicher,* 72 F. Supp. 895 (D. C. Md.); *Porter* v. *Kaibel,* 5 OPA Op. & Dec. 5117 (D. C. Minn.); *Bowles* v. *Buckner* (W. D. Wash.), decided February 12, 1946, No. 1281, not reported).

The contrary position has been taken in two cases (*Creedon* v. *Stone,* 163 F. 2d 393 (C. C. A. 6th)), petition for certiorari granted December 8, 1947, but not yet acted upon; and *Thompson* v. *Taylor,* 62 F. Supp. 930 (S. D. Fla.).

In *Creedon* v. *Stone, supra,* the Sixth Circuit, holding that the limitation period ran from the time when the rent was collected, said the following (p. 395):

> Read in the ordinary sense, as applied to the payment of rent, Section 205 (e) plainly provides that each separate overcharge is the violation referred to. Each separate overcharge is certainly a violation of the regulation or order "prescribing a maximum price," and each separate overcharge gives rise to a cause of action for the violation. *Gilbert* v. *Thierry,* 58 F. Supp. 235 (D. C. Mass.), affirmed *Thierry* v. *Gilbert,* 147 F. 2d 603, 604 (C. C. A. 1st). There is no merit in the contention that the violation upon which this cause of action is based is the failure or refusal to make the refund. Such a failure or refusal is a violation of Section 4 (e) of the Rent Regulation for Housing, and if a refund order is issued by the Administrator, it is a violation of the order, but such failure or refusal is not the violation specified in Section 205 (e), which is the violation of the "maximum price regulation" or order. To causes of action based on these overcharges, since they are violations under Section 205 (e), the one-year statute of limitations applies.

The opinion of the Sixth Circuit is wrong in many respects.

1. First, reliance on *Gilbert* v. *Thierry,* 58 F. Supp. 235 (D. C. Mass.), is misplaced. In the usual case where no retroactive order of the Area Rent Director is involved, and where the landlord merely charges more rent than the maximum rent established by the Regulation on the maximum rent date, the violation occurs at the same time that the excess rent is collected. That is the case of which *Gilbert* v. *Thierry* is typical. In such a case, it is true that the statute of limitations would run from the time of collection of rent. The instant case does not involve such a situation. Here, at the time of collection of rent after the first rental, it is uncertain whether any order of reduction of the maximum rental will ever be entered. If no order of reduction is entered, the original rent remains the maximum rent, and neither the tenant nor the Administrator could sue for statutory damages. If neither party could sue before the order of reduction is entered, it is clear they are barred from doing so only because no cause of action arose before the issuance of the order of reduction. If no cause of action arose before the issuance of the order of reduction, it is difficult to understand how the statute of limitations could start to run at any earlier time.

2. The decision of the *Stone* case is erroneous in still another respect. It will be noted that the Court in that case concedes that failure to refund is a violation of the retroactive rent reduction "order," but takes the position that such failure or refusal is not the violation specified in Section 205 (e), which

is the violation of the "maximum price regulation" or "order." The Sixth Circuit Court of Appeals was obviously confused in thinking an order issued by the Area Rent Director was not the kind of order specified in Section 205 (e). That it is precisely such an order is now beyond dispute. See *Bowles* v. *Willingham,* 321 U. S. 503, where an individual rent reduction order of an Area Rent Director was involved, and *Porter* v. *McRae,* 155 F. 2d 213 (C. C. A. 10th); *Bowles* v. *Lake Lucerne Plaza,* 148 F. 2d 967 (C. C. A. 5th), certiorari denied, 66 S. Ct. 31; *Creedon* v. *Babcock,* 163 F. 2d 480 (C. C. A. 4th); *Bell* v. *Fleming,* 159 F. 2d 416 (E. C. A.), where the validity of retroactive rent reduction orders of Area Rent Directors were considered and upheld by the Emergency Court of Appeals. See also, *Easley* v. *Fleming,* 159 F. 2d 422 (E. C. A.).

3. In addition, the conclusion reached by the Sixth Circuit Court is at odds with the established principle that a wrongdoer may not benefit from his own wrong. See, e. g., *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U. S. 251, rehearing denied, 327 U. S. 817; *R. H. Stearns Company* v. *United States,* 291 U. S. 54. The retroactive rent reduction order, which as we shall show in the next point, must be accepted as valid and binding for all purposes in these proceedings, is issued by the Area Rent Director only where a landlord has proceeded in disregard of the law, such as by failing to file a timely registration statement. By the landlord's delay in registering, the fact of renting is concealed from the Administrator, and investiga-

tion of the premises for review of the maximum rental is postponed. To prevent the landlord from benefiting from his own complete disregard of the Act and the Rent Regulation, the retroactive order requires him to refund to the tenant all overcharges collected during the period of noncompliance. *150 East 47th Street Corporation* v. *Fleming,* 162 F. 2d 206, 207 (E. C. A.). On the theory upheld by the Sixth Circuit, however, the longer the delay in registration, or "the more grievous the wrong done, the less likelihood there would be of a recovery." *Bigelow* v. *RKO Radio Pictures, Inc., supra.* To allow hundreds of landlords to escape liability under the Emergency Price Control Act and under the Housing and Rent Act of 1947 because of their own inaction or wilful concealment and wrongdoing, is bound not only to invite disregard of the provisions of the Housing and Rent Act of 1947, but also to breed contempt for law generally.

It is for these reasons that the Solicitor General has agreed to apply to the Supreme Court for certiorari in the *Stone* case. The petition for certiorari was filed on October 6, 1947, and certiorari was granted December 8, 1947.

B. Even if the statute of limitations is construed to start running from the date of the overcharge, no part of this claim would be barred in any event because the failure to refund is the overcharge

Even if the assumption of the Court below is accepted, that the statute starts running at the time of the "overcharge," rather than the "violation," it is submitted that the overcharge occurred at the time of the failure to refund, rather than at the time the

rent was collected. Under the terms of the Regulation, the rent collected by the landlord is not irrevocably received, but is received subject to an obligation to refund the excessive portion thereof if the rent is subsequently determined by the Administrator to be too high. This specific provision must be deemed to be incorporated by reference into the landlord's contract with the tenant; the rent collected after the reduction of services is received only tentatively until the order is issued establishing the maximum rent. Putting it another way, "overcharge" is defined in Section 205 (e) of the Act as "the amount by which the consideration exceeds the applicable maximum price," and the consideration is not finally determined until it is known whether the landlord will or will not refund. Again, there is no actually ascertained "charge" until the amount of rent that is to be retained by the landlord is determined, and hence, no "overcharge" until the period authorized for refund has expired. This is true only because the Regulation expressly renders nonviolative the receipt of more than the subsequently determined ceiling rent, provided that timely refund is made. The landlord has not overcharged until the maximum rent is reduced retroactively, for until that time, the maximum rent was the rent charged on the first renting. Until the order was issued, there was neither an overcharge nor a violation, except the violation of failing to register, which as mentioned above is not the basis of the present action. *Creedon* v. *Babcock, supra.* To repeat, the basis of this action is the refusal to

obey the retroactive rent reduction order, and this order, as we shall now show, must be accepted as binding and valid here in all respects and for all purposes in these proceedings.

II

In accepting the order of the area rent director dated October 31, 1945, as valid and binding in all respects and for all purposes in the proceedings before it, the court below properly complied with section 204 (d) of the act, which gives the Emergency Court of Appeals exclusive jurisdiction over questions relating to validity of orders

Pursuant to decisions of the Supreme Court and of this Court, the District Court properly accepted the order of the Area Rent Director as valid in all respects and for all purposes in these proceedings. Any question of the validity of the Rent Regulation or of the individual rent reduction orders issued pursuant thereto in the case at bar, on the ground of improper retroactivity or any other constitutional or statutory ground, was withdrawn from the jurisdiction of the lower Court and committed to the exclusive jurisdiction of the Emergency Court of Appeals by Section 204 (d) of the Act (App. 24). *Yakus* v. *United States,* 321 U. S. 414, 64 S. Ct. 660; *Bowles* v. *Willingham,* 321 U. S. 503, 64 S. Ct. 641; *Case* v. *Bowles,* 66 S. Ct. 438; *Martini* v. *Porter,* 157 F. 2d 35 (C. C. A. 9th), certiorari denied, 67 S. Ct. 1091; *Rosensweig* v. *United States,* 144 F. 2d 308 (C. C. A. 9th), certiorari denied, 65 S. Ct. 117; *Shyman* v. *Fleming,* 163 F. 2d 461 (C. C. A. 9th); *United States* v. *Fish,* 154 F. 2d 798 (C. C. A. 2d), certiorari denied, 66 S. Ct.

1377; *Fleming* v. *Dashiel,* 161 F. 2d 612 (C. C. A. 9th). "* * * Where an order upon its face is clearly applicable, any failure by the district court to enforce it is in legal effect the equivalent of declaring the order invalid. This the district court has no power to do" (*Fleming* v. *Dashiel, supra,* 158 F. 2d at p. 613, footnote 2).

The exclusive jurisdiction clause protects "any regulation or order issued under Section 2," thereby extending to all orders establishing maximum prices or rents, whether they be established directly in broad regulations (under Sections 2 (a) and 2 (b)), or established separately for individual sellers or landlords, pursuant to authority of the broad regulation (Section 2 (c) of the Act) (App. 23). The significant reasons noted by the Supreme Court in the *Yakus* case, *supra* (321 U. S. 414), for the exclusive jurisdiction plan—e. g., need for uniformity of decision; necessity of avoiding delayed or unequal control and enforcement; importance of fully utilizing the Administrator's specialized experience—all apply as fully to individual orders as they do to orders of general applicability. The Supreme Court itself has held that objections to validity of an individual rent order issued by the Area Rent Director could be made only in the Emergency Court. *Bowles* v. *Willingham,* 321 U. S. 503, 509–510, 521.[2] Those Circuit Courts of Appeals in which

[2] "Other objections are raised concerning the regulations or orders fixing the rents. But these may be considered only by the Emergency Court of Appeals on the review provided by Section 204. *Yakus* v. *United States, supra*" (*Bowles* v. *Willingham, supra,* 321 U. S. at p. 521).

the question has arisen have decided similarly. *Bowles* v. *Lake Lucerne Plaza,* 148 F. 2d 967 (C. C. A. 5th), certiorari denied, 66 S. Ct. 31; *Creedon* v. *Babcock,* 163 F. 2d 480 (C. C. A. 4th); *Bowles* v. *Meyers,* 149 F. 2d 440 (C. C. A. 4th); *Porter* v. *McRae,* 155 F. 2d 213 (C. C. A. 10th); and so, too, have the Federal district courts (*Haber* v. *Garthly,* 67 F. Supp. 774 (E. D. Pa.); *Parham* v. *Clark,* 68 F. Supp. 17 (E. D. Mich.)). The Emergency Court of Appeals has taken jurisdiction of protest proceedings against (and has upheld) individual reductions of rent issued by Area Rent Directors which were retroactive in operation. *Womac* v. *Bowles,* 146 F. 2d 497 (E. C. A.; *Bell* v. *Fleming,* 159 F. 2d 416 (E. C. A.); see too, *Polis* v. *Creedon,* 162 F. 2d 908 (E. C. A.).

Defendant was not thereby deprived of the opportunity to raise any objections he might have to the validity or fairness of the rent-reduction order. However, any such objections could be raised only through the protest procedure and in the Emergency Court, pursuant to Sections 203 and 204 of the Act. *Bowles* v. *Seminole Rock and Sand Company,* 325 U. S. 410, 418–419; *Yakus* v. *United States, supra; Bowles* v. *Willingham, supra.*

CONCLUSION

It is respectfully submitted that the judgment below be affirmed.

Respectfully submitted.

ED DUPREE,
General Counsel,

HUGO V. PRUCHA,
Assistant General Counsel,
Litigation Branch,

NATHAN SIEGEL,
Special Litigation Attorney,
Office of the Housing Expediter, Office of the General Counsel, Temporary "E" Building, Washington 25, D. C.

APPENDIX

Statute and Regulations Involved

1. *Emergency Price Control Act of 1942,* as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App. Supp. II, Secs. 901 et seq.).

Section 2 (b):

"(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in

such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs within such defense-rental area. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area. * * *"

SECTION 2 (c):

"(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating

costs. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

SECTION 2 (g):

"(g) Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

SECTION 4 (a):

"(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing."

SECTION 201 (d):

"(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

SECTION 204 (d):

"* * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any

regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provisions of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provisions of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

SECTION 205 (e):

"(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the

occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period.

"If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. [The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending

on the date of enactment of this Act and with respect to proceedings instituted thereafter.]"

2. *Rent Regulation for Housing* (8 F. R. 7322).

SECTION 1 (a):

"§ 1. Scope of this regulation—(a) Housing and defense-rental areas to which this regulation applies.—This regulation applies to all housing accommodations within each of the portions of a defense-rental area (each of which is referred to hereinafter in this regulation as the 'defense-rental area'), which are listed in Schedule A of this regulation, except as provided in paragraph (b) of this section."

SECTION 2 (a):

"§ 2. Prohibition against higher than maximum rents—(a) General prohibition.—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received."

* * * * *

SECTION 4:

"§ 4. Maximum rents. Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

"(a) *Rented on maximum rent date.* For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date."

* * * * *

"(e) *First rent after effective date.* For (1) newly constructed housing accommodations without priority rating first rented on or after the effective date of regulation, or (2) housing accommodations changed on or after such effective date so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time during the two months ending on the maximum rent date nor between that date and the effective date, the first rent for such accommodations after the change or the effective date, as the case may be, but in no event more than the maximum rent provided for such accommodations by any order of the Administrator issued prior to September 22, 1942. Within 30 days after so renting, the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

"If the landlord fails to file a registration statement within the time specified, the rent received for any rental period commencing on or after the date of the first renting or October 1, 1943, or the effective date of regulation, whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under section 5 (c) (1).

"In such case, the order under section 5 (c) (1) shall be effective to decrease the maximum rent from the date of such first renting or from the beginning of the first rental period on or after October 1, 1943, or the effective date of regulation, whichever is the later. The foregoing provisions and any refund thereunder do not affect any civil or criminal liability provided by the act for failure to file the registration statement required by section 7."

SECTION 5:

"§ 5. Adjustments and other determinations. In the circumstances enumerated in this section the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required."

* * * * *

"(c) *Grounds for decrease of maximum rent.* The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

"(1) *Rent higher than rents generally prevailing.* The maximum rent for housing accommodations under paragraphs (c), (d), (e), (g), or (j) of section 4 is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date."

SECTION 7 (a):

"§ 7 Registration—(a) *Registration statement.* On or before the date specified in Schedule A of this regulation, or within 30 days after the property is first rented, or offered for rent, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by the regulation for such dwelling unit and shall contain such other information as the Administrator shall require."

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